THE ADEQUACY OF WHISTLEBLOWER PROTECTION: IS THE COST TO THE INDIVIDUAL WHISTLEBLOWER TOO HIGH?

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I. INTRODUCTION

Loyalty: this word evokes strong feelings in both the personal and business settings. It is a highly sought after trait that almost all business entities find imperative.[1] Who wants an employee who would put his own interests before those of the company? While the ideal vision of a "company man" may no longer exist, companies still value employees who adhere to the company vision or credo.[2] In fact, some companies claim employees to be their most valued company asset.[3] The claims of vision statements and company values can be far from the day-to-day happenings within a company or workplace. An obedient employee could be someone who does not question company practices, rather than an employee who strives to adhere to company principles.[4] The differences between company practice and principle can span far and wide.

This past decade has seen numerous instances of corporate fraud with infamous cases such as Enron and WorldCom.[5] Company practice strayed far from company principle with the commission of egregious fraud.[6] These practices came to light because employees stepped forward and brought attention to these actions.[7] Rather than being praised for their actions, these women faced a great number of personal and professional obstacles because their actions were viewed as disloyal.[8] Is it disloyal to question whether company practice adheres to company principle? Firing and workplace difficulties of whistleblowers would suggest an affirmative response.[9] Thankfully, Congress has stepped in to provide some protection

1. Lauren Keller Johnson, *The New Loyalty: Make it Work for Your Company*, 10 HARV. MGMT. UPDATE 3 (2005), *available at* http://hbswk.hbs.edu/item/5000.html.

2. Jeffrey M. Saltzman, *New School Employee Loyalty*, THE KENEXA BLOG (Sept. 16, 2008), http://www.kenexa.com/getattachment/552eadff-29e9-48ed-a48d-db5b7f694d92/New-School-Employee-Loyalty.aspx.

3. *Id.*

4. *Compliance or Obedience? It Comes Down to Management Style*, PASCO RISK MGMT. (Aug. 17, 2010, 12:19 PM), http://www.pascorisk.com/featured-articles/compliance-or-obedience-it-comes-down-to-management-style (finding that obedience is a blind willingness to obey, whereas compliance seeks to protect the ethical health of the organization).

5. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, http://www.time.com/time/magazine/article/0,9171,1003998,00.htm.

6. *See id.*

7. *Id.*

8. *Id.*

9. *See id.*

for these individuals.[10] The passage of the Sarbanes-Oxley Act of 2002 has added to whistleblower protection.[11] However, there are gaps left between the federal and state provisions which leave some employees vulnerable to employer retaliation.[12]

Whistleblowers pay a personal and psychological price that should be acknowledged by society.[13] It is much easier for an employee to keep her head down and not question authority – especially in today's job market. This form of blind obedience can be construed as company loyalty.[14] However, the truly loyal employee takes a stance against the mainstream company policies if legitimate reasons surface, such as questionable accounting practices.[15] The famous Milgram Obedience Experiment highlights how far a seemingly normal person will go in the name of obedience or conforming to authority.[16] Milgram discovered that a surprising percentage of people would increase electrical voltage on another human being to extremely fatal levels simply because of an authoritative figure's instructions.[17] The corporate structure or workplace creates a segmented hierarchy of authority. Thus, it would not be surprising to apply Milgram's findings to the workplace. As Milgram said, "[t]he social psychology of this century reveals a major lesson: often it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act."[18] Promoting ethical decisions among employees should equate to the promotion of increased whistleblower protection from a statutory perspective.

Section II of this article will examine the history of the employment-at-will doctrine in the United States and the emergence of legal protection for whistleblowers. In section III, this article will survey the current federal and state statutory provisions for whistleblowers. In addition, this section will look at the common law protection available under the public policy exception to the employment-at-will doctrine. This section will

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10. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004).

11. *Id.*

12. *Id.* at 1070.

13. Lacayo & Ripley, *supra* note 5.

14. *Id.*

15. Lacayo & Ripley, *supra* note 5.

16. Gregorio Billikopf Encina, *Milgram's Experiment on Obedience to Authority* (2003), http://cnr.berkeley.edu/ucce50/ag-labor/7article/article35.htm.

17. *Id.*

18. *Memorable Quotes - Dr. Thomas Blass Presents: Stanley Milgram*, http://www.stanleymilgram.com/quotes.php (last visited October 20, 2011).

also delve into the whistleblower protections passed in the recent Sarbanes-Oxley legislation and look at the benefits and drawbacks of its anti-retaliation provisions.

Section IV will provide a glimpse into the harrowing maze of choices an employee whistleblower faces at the state level when deciding to file a claim (and will use Texas law as an example). Section V will observe the continued importance of whistleblower protection with current examples of individuals revealing fraud within their workplace. Section VI will point out the gaps in whistleblower protection and argue for an expansion in employee coverage through the adoption of general whistleblower protection at the federal level. This could provide an example for expansions in whistleblower protections at all levels. Congressional action would be the clearest and most effective means to improve the protections available to whistleblowers.

II. HISTORICAL ROOTS OF WHISTLEBLOWER LAWS

The foundation for U.S. whistleblower protection began with the early labor statutes.[19] These laws included provisions to protect employees against employer retaliation.[20] However, these rules were largely limited to union members and, consequently, their application did not reach the majority of employees.[21] Prior to the start of the 20th century, the majority of labor relations went unregulated.[22] However, the presence of unions helped bring attention to the lack of employee rights.[23] The country was in the midst of a major transition from an agrarian society to one of industrialization.[24] The "government neutral" view of labor relations believed that work related issues were best left to the employee and employer to settle.[25] The unions stepped in to fill the gap in knowledge and power between the employer and employee.

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19. Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-will doctrine,* 34 TEX. TECH L. REV. 1133, 1140 (2003).

20. *Id.*

21. *Id.*

22. Robert P. Hunter, *Michigan Labor Law: What Every Citizen Should Know,* THE MACKINAC CENTER FOR PUBLIC POLICY, Aug. 1999, at 7 ("For much of American history, labor relations . . . were considered private matters best settled between employers and employees.").

23. *Id.*

24. *Id.* at 8.

25. *Id.* ("[T]he workplace began to change . . . [and] employees acting together to address workplace issues increasingly drew the attention of the courts.").

With these societal and cultural changes occurring, American laws also began recognizing the potential for fraud and corruption in the business world. Employees were generally left to the mercy of their employers if the employee tried to bring attention to a corrupt practice or trade discovered during their employment.[26] Employees needed protection against the potential retaliation of their employer. Otherwise, what incentive would there be for an employee to risk his livelihood other than perhaps ethical reasons? The disparity in bargaining power between the employer and employee would understandably cause the employee to require some sort of legal protection before taking such a potentially monumental risk.

Interestingly, the government utilized financial incentives to encourage whistleblowing by passing a law during the Civil War era entitled the False Claims Act.[27] This law has also been named the "Lincoln Law" because of its historical connection and significance to the famed president.[28] Apparently, profiteers saw the Civil War's political and civil turmoil as a prime opportunity to overcharge and ultimately take advantage of the government.[29] For example, profiteers shipped boxes of sawdust instead of requested guns to the Union Army or sold the Union Army the same horses multiple times.[30] Many profiteers during this time expressed no shame for their rapacious actions.[31]

To curb these fraudulent practices, President Abraham Lincoln pushed for the passage of the False Claims Act.[32] Under the Act's "qui tam" provisions, private citizens were permitted to sue, on the government's behalf, a company or individual involved in fraud against the government.[33] The financial incentives were quite enticing. Particularly, the first version of

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26. *See* Jessica Centers, *Protecting the Insider*, SUPERLAWYERS, Apr. 2009, at 1.

27. Phillips & Cohen LLP, *False Claims Act History: History of the False Claims Act and "Qui Tam" Cases,* http://www.phillipsandcohen.com/False-Claims-Act-History/ [hereinafter *History of the False Claims Act*]; *see* James B. Helmer, Jr., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION (Top Gun Publishing LLC 2007) (1994).

28. Phillips & Cohen LLP, *False Claims Act History: History of the False Claims Act and "Qui Tam" Cases,* http://www.phillipsandcohen.com/False-Claims-Act-History/ ("The False Claims Act . . . was enacted during the Civil War to combat the fraud perpetrated by companies that sold supplies to the Union Army.").

29. *See id.*

30. *Id.*

31. *Id.* (quoting the statement of profiteer who prospered from unloading moth-laden blankets for the Union Army: "[y]ou can sell anything to the government at almost any price you've got the guts to ask").

32. *See id.*

33. *See History of the False Claims Act, supra* note 27 ("'Qui tam' is short for a Latin phrase, '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which roughly means 'he who brings an action for the king as well as for himself.'").

the Act charged those who defrauded the government double in damages and a $2,000 civil fine per claim.[34] The citizen who filed the suit was entitled to 50 percent of the government's recovery.[35]

The False Claims Act of 1863 went unaltered until 1943 when Congress made drastic changes to filing citizens' potential recovery.[36] First, Congress greatly reduced the reward percentage that could be attained.[37] Second, no qui tam lawsuit was available for claims upon which the government already possessed relevant information.[38] Thus, whistleblowers could not file suit if the government had any existing knowledge on the alleged fraudulent activity.[39] Moreover, many claims were rejected even if the whistleblower was the source of the government's most damaging information.[40] Thus, the whistleblower incentive disappeared in conjunction with the utilization of the False Claims Act.[41]

The False Claims Act came to the forefront again during the 1980s.[42] Congress decided to take another look at the Fair Claims Act law because of the widespread abuses committed by defense contractors against the government.[43] For instance, there were reports that defense contractors sold toilet seats to the Navy for the outrageous price of $640.[44] In fact, the Department of Defense indicated in 1985 that 45 of the top 100 defense contractors were under investigation for fraud.[45] Taken together, these circumstances greatly mirrored the original setting which catalyzed the False Claims Act's creation.

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34. *Id.* ("The original False Claims Act assessed wrongdoers double damages and a $2,000 civil fine for each false claim submitted.").

35. *Id.*

36. *Id.* ("The statute remained virtually unchanged until 1943 when Congress radically altered the qui tam provisions.").

37. *Id.*

38. *Id.*

39. *See History of the False Claims Act, supra* note 27 ("This provision effectively prevented whistleblowers from filing a qui tam lawsuit if any government employee had a received a tip about the fraud or if any information about the fraud was contained in any government file, even if the government was not investigating the matter or trying to stop the fraud . . . .").

40. *Id.*

41. *See id.*

42. *Id.*

43. *Id.* ("Defense contractor practices were receiving the greatest media attention. In part, this was due to the vastly increased defense spending spurred by the Reagan administration's response to the Cold War.").

44. *Id.* at 2.

45. *Id.*

Congress revised the act by creating incentives for attorneys to take these cases and for whistleblowers to come forward.[46] These amendments were passed in 1986 and included financial incentives which would allow a whistleblower to receive between 15 and 30 percent of the government's total recovery.[47] Attorneys were promised the payment of their hourly fees by the defendant.[48] In 2009 and 2010, Congress made further revisions to the Act with the purpose of clarifying congressional intent.[49] Since the 1986 amendments to the False Claims Act's qui tam provision, with both reinstated financial incentives and increased public knowledge of the law, more than 6,000 lawsuits have been filed.[50]

There are two general models that address the potential plight of a whistleblower. The first model, as seen above, involved financial incentives to report alleged wrongdoing against the government and has been relatively successful.[51] Another model is statutory in nature and prevents employer retaliation.[52] The Wagner Act was passed after the Great Depression and promoted collective bargaining.[53] This act is now known as the National Labor Relations Act (NLRA).[54] The civil rights era saw many advances through federal regulations in areas such as public health and workplace safety.[55] However, no statutory or common law rules existed at that time to protect employees against employer retaliation.[56]

This changed in 1978 with the passage of the Civil Service Reform Act.[57] This act followed a loss of public faith in business and government as a result of various events such as

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46. *Id.* ("Frustrated with the government's inability to respond effectively to outrageous charges and other improper billing behavior to government contractors, Congress decided to revise the False Claims Act to encourage more whistleblowers to come forward and to create incentives for private attorneys to use their own resources to investigate fraud ").

47. *See History of the False Claims Act*, *supra* note 27, at 2.

48. *Id.*

49. *Id.* ("These amendments clarified terms used in the original law that were not defined in the statute . . . [as] [s]ome court opinions had construed [these] terms in ways that did not accord with congressional intent.").

50. *Id.*

51. *See id.*

52. Jones, *supra* note 19, at 1140.

53. *Id.*

54. *Id.* ("The Wagner Act . . . prohibits employers from retaliating against employees for participating in peaceful union activities or providing evidence to help enforce the NLRA.").

55. *Id.* at 1140-41.

56. *Id.* at 1141.

57. *Id.*

Watergate.[58] This Act was ground-breaking because it was the first law to ensure that a civil service employee could bring an action for alleged corrupt practices and without the fear of arbitrary retaliation by her employer.[59]

This Act was amended by the Whistleblower Protection Act (WPA) of 1989.[60] The Office of Special Counsel was also created with the WPA and handled the administrative side of whistleblower protection.[61] It is important to note that these provisions still apply only to federal employees.[62]

States do provide protection for whistleblowers through their own legislation. Thirty-nine states had legislation dealing with protection for public employees, as of 2000, while less than 25 have protections for all employees including private sector employees.[63] It seems that private sector employees fall prey more often to the employment-at-will doctrine.[64] This doctrine essentially states that an employer can fire an employee at any time, or an employee can walk away from a position at any time without repercussion in the absence of a contract.[65] This policy allows for freedom of contract and keeps some labor disputes out of courts.

This does not mean that private sector employees are not ever wrongfully discharged. In fact, the Enron whistleblower would not have received any protection against employer retaliation with the laws that existed at the time.[66] There was no legal protection for "corporate whistleblowers exposing fraud to shareholders."[67] Congress took note and passed the Sarbanes-Oxley Act in 2002.[68] This law created an avenue for a whistleblower to file a wrongful retaliation complaint with the

58. *Id.* ("With the substantial increase of federal regulations, society surmised that businesses regularly engaged in corrupt practices. People had once viewed businesses as having great integrity, yet the passing of these new regulations revealed corruption in the workplace and led people to doubt the trustworthiness of businesses.").

59. *Id.*

60. *Id.*

61. *Id.* ("[T]he Office of Special Counsel . . . is responsible for protecting federal employee whistleblowers, handling claims, and investigating reports of wrongdoing.").

62. *Id.*

63. *Id.* at 1141-42 (It appears "that society has a more significant interest, and a greater stake, in reports of misconduct in government agencies than in the private sector.").

64. *Id.* at 1142.

65. *Id.* ("This 'common-law doctrine of employment-at-will is a distinctive attribute of the Anglo-American commitment to the individual enterprise and free markets.'").

66. *See* Centers, *supra* note 26.

67. *Id.*

68. *Id.*

U.S. Department of Labor.[69] The efficacy of the law has been hotly debated as the Department of Labor has dismissed a great number of these suits.[70] Corporate whistleblowers appear to have shaky protection at best from a legal standpoint.

The area of whistleblower law contains many confusing paths which do not have many strong case precedents.[71] While this leaves open the ability for lawyers to have a hand in shaping the application of the law in the courtroom, it also leaves an air of vulnerability around whistleblowers who are unsure of their options or success. A prominent lawyer who specializes in this area of law stated that

> [w]histleblowers are the link between misconduct and reform. The worker on the inside always knows where the skeletons lie . . . . It's proven under the False Claims Act that whistleblowers are more effective than all the auditors, inspectors general and layers of bureaucracy paid for by the taxpayers to find this fraud."[72]

With this in mind, it makes sense to pass legislation which would cover the majority of employees and perhaps utilize the incentive model more broadly given its proven success. The current state of whistleblower laws highlights the problem areas and obstacles which should be minimized to ensure that the societal benefit of whistleblowers is maintained.

III. SURVEY OF CURRENT WHISTLEBLOWER LAWS

As mentioned in the former section, the sources of whistleblower laws are federal statutes, state statutes, and a public policy exception to the common law employment-at-will doctrine.[73] However, the protection afforded the individual changes based on the jurisdiction in which the employee resides.[74] A court in one state can interpret reporting

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69. *Id.*

70. *Id.* ("[T]he Department of Labor has dismissed . . . those complaints, asserting that employees of subsidiaries of publicly traded companies are not protected under the act.").

71. *Id.* at 5 ("You find that in almost all whistleblower laws, these are still relatively new legal protections and because of that, very few Supreme Court cases interpreting laws.").

72. *Id.*

73. Gerard Sinzdak, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1638 (2008).

74. *Id.*

requirements or other various aspects of whistleblower law in vastly different ways than another state.[75] The federal statutes offer a more standardized type of protection, but their application is usually very limited.[76] For example, the Sarbanes-Oxley Act of 2002 limits its application to employees of public companies that report to the SEC when the employees discover federal securities law violations.[77] An individual employee working for a private sector employer usually has to rely on state law for protection with a few exceptions.[78]

A. *Federal Laws*

The two models for whistleblower protection include the incentives based model as seen in the False Claims Act and the model focused on protection from employer retaliation.[79] The success of the False Claims Act can hardly be disputed after a total recovery of almost $25 billion for the government.[80] The historical use of this act was for defense contractor fraud, but the majority of new cases arise in the field of health care.[81] For example, the Hospital Corporation of America, the nation's largest for-profit healthcare provider, paid the government $1.2 billion.[82] The claims were based on HCA overcharging Medicare.[83] Another recent case was against National Health Laboratories, a case in which a whistleblower revealed the company practice of labs pushing doctors to order tests that were medically unnecessary. NHL was ordered to pay $111 million back to the government.[84] Despite its success, the False Claims Act has been challenged with congressional reform and judicial

75. *See id.* at 1642-43.

76. *Id.* at 1648 ("Although federal whistleblower laws are generally more protective than state laws with respect to report recipients, they only protect reports of very specific types of employer wrongdoing—namely, violations of a limited number of federal laws.").

77. Cherry, *supra* note 10, at 1032-33.

78. Sinzdak, *supra* note 73, at 1638.

79. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000).

80. Centers, *supra* note 26, at 2.

81. *See id.*

82. *Id.* ("[This] case . . . lasted 10 years and involved 70 lawyers from multiple firms . . . [and] ended in 2002 with the company paying the government $1.7 billion to resolve all the cases of the company over-billing Medicare. It also helped to clean up fraudulent, industry-wide Medicare billing practices.").

83. *Id.*

84. *Id.* ("[This] whistleblower . . . exposed the practice of bundling tests . . . and . . . the government collected almost $1 billion from labs engaged in similar practices.").

opinion.[85] Regardless, this Act has remained mostly intact even with those who would oppose its purpose and methods.[86]

Another modern approach to the incentives model provides rewards to the employer for his action in establishing whistleblowing procedures, rather than the employee whistleblower who uncovers some sort of fraudulent action on behalf of his or her employer.[87] Essentially, this model creates tangible reasons for employers to have adequate whistleblower practices and procedures in place. These are called Corporate Sentencing Guidelines and "encourage corporate 'rightdoing' by mitigating sanctions such as large fines, corporate probation, and mandated negative publicity for corporations that have an effective compliance program and are convicted of federal crimes."[88] The most common company procedure qualifying for these employer incentives is a hotline.[89] This whistleblower procedure must be made accessible to the employees within the company to qualify.[90] The incentive based models for statutes are linked to statutes which are purposefully designed to target issues surrounding whistleblowing.[91] Another type of statute is an adjunct statute in which the statute "provides protection to whistleblowers through statutes designed to address a particular problem."[92]

The adjunct statutes apply in a number of legislative arenas such as the NLRA which was the first congressional act to include a provision against employer retaliation.[93] The whistleblower protection in these types of statutes does fall second to a primary agenda, which in the case of NLRA would be the protection of employees involved in union activities.[94] This essentially means that "those who disclose wrongful activity are covered only if their reports concern matters regulated by the act

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85. Callahan & Dworkin, *supra* note 79, at 102.

86. *See id.*

87. *Id.* at 103.

88. *Id.* ("This 'carrot' has effectively prompted major companies to establish whistleblowing procedures.").

89. *Id.*

90. *Id.* ("An important part of such a program is a whistleblowing procedure that is well publicized, monitored, and under which complaints are acted on without retaliation to the whistleblower.").

91. *Id.*

92. *Id.*

93. *Id.* at 104.

94. *Id.* ("Like the NLRA, most subsequent federal acts prohibiting retaliation against whistleblowers were enacted principally to carry out or ensure a non-whistleblowing purpose.").

or they are within the employee group protected by the act."[95] These limitations have been liberally interpreted on behalf of the whistleblower trying to uphold the purpose of the statute. The confusion surrounding federal protection of whistleblowers has caused some to propose general protection for federal whistleblowers via statute.[96]

From a federal standpoint, general whistleblower protection for federal employees resides in the Whistleblower Protection Act of 1989.[97] This Act provides protection to federal employees and creates a separate entity for reporting purpose called the Office of Special Counsel.[98] While the protection is limited to federal employees, an employee of any type can report an incident.[99] Private sector employees as well as federal employees can receive legal protection under various federal statutes which are usually tailored to a particular legislative purpose.[100] For example, the Occupational Safety and Health Act provides protection for both federal and private employees who report violations of this statute.[101] The infamous events of Enron led to the passage of the Sarbanes-Oxley Act of 2002, in which Congress hoped to encourage a move toward heightened business ethics by protecting those who reported violations from being wrongly discharged.[102] This statute included a specific provision for whistleblower protection in Section 806.[103] Outside of these specified legislative areas containing whistleblower provisions, the private sector employee has to look to state statutes for the majority of her legal protection.[104]

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95. *Id.* ("For example, employees reporting illegal pollution of water would be protected under the Safe Drinking Water Act, and miners are protected by the Federal Mine Health and Safety Act.").

96. *Id.* at 105.

97. Whistleblower Protection Act of 1989, Pub. L 101-12, 103 Stat. 16 (1989).

98. Sinzdak, *supra* note 73, at 1638-39 ("[T]he Whistleblower Protection Act . . . provides a specific external entity to whom whistleblowers may report, namely the Office of Special Counsel . . . . The OSC investigates both the alleged violations that whistleblowers report and claims of retaliation against whistleblowers.").

99. *Id.* at 1639.

100. *Id.*

101. *Id.; see generally* Melissa A. Bailey et al., OCCUPATIONAL SAFETY AND HEALTH LAW HANDBOOK (Government Institutes 2d ed. 2008).

102. Cherry, *supra* note 10, at 1055 ("Congress aimed to reduce accounting fraud, police insider transactions, and ensure the integrity of analyst research. In short, the purpose of the legislation is to increase transparency in financial markets, which allows investors to rely on the accuracy of financial information.").

103. *Id.* at 1064.

104. Sinzdak, *supra* note 73, at 1638.

B. *State Laws*

States have differing amounts of protection for whistleblowers statutorily and interpret the public policy exception on a broad spectrum. On top of this, states' reporting requirements can make the task of properly reporting a violation quite difficult to complete and receive adequate legal protection from an employer's potential retaliatory discharge.[105] With all these requirements operating on a sliding scale of sorts, it is not surprising that employees face a challenging series of obstacles to be successful invoking whistleblower protection laws in the face of their termination.[106] Reform is needed to help those who are fulfilling a societal need by stepping out as a whistleblower to receive his full justice.

The role of states in the protection of whistleblowers was not prominent until the 1980s as the federal arena provided the majority of the legal provisions to keep a whistleblower from facing persecution prior to this point in history.[107] However, two events caused a shift in legislative focus regarding the legal protection of whistleblowers.[108] These were "the passage of whistleblower protection statutes and the erosion of the employment-at-will doctrine through the adoption of the tort theory of firing in violation of public policy."[109] The first case to acknowledge a public policy issue with complete employer autonomy regarding employment-at-will occurred in 1959 with the *Peterman v. Int'l Board of Teamsters* case.[110] This case precedent was slow to take hold at the state level. It took a couple of decades before state courts would consider going against the freedom to contract principle and make a decision to override the autonomy of the employer in situations where the

105. *Id.* at 1633-34 ("Most state whistleblower statutes restrict the parties to whom a whistleblower may report in order to receive protection from retaliation. The majority of states . . . protect only those employees who file reports with external government bodies . . . . A few states take the opposite approach, requiring employees to first report their suspicions internally to supervisors . . . . A rigid report requirement—whether external or internal—cannot match the diversity of situations in which employees find themselves.").

106. *Id.*

107. Callahan & Dworkin, *supra* note 79, at 105.

108. *Id.*

109. *Id.* at 105-06 ("The wrongful firing theory holds that employees should not be able to use their power as employers to subvert public policy as established by the legislatures or the courts.").

110. *Id.* at 105-06; *see also* Peterman v. Int'l Board of Teamsters, 344 P.2d 25 (Cal. App. 2d 1959).

public good was arguably threatened by the actions of the employer against the employee.[111]

The wrongful firing theory allows an employee to sue his employer in tort if the employee is "actually or constructively fired for refusing to violate a law, rule or regulation, or who report[ed] a violation of such."[112] Punitive damages can even be awarded for the plaintiff in these types of cases.[113] However, many states do not construe this cause of action liberally.[114] Instead, there usually has to be an established rule or regulation that is the basis of the claim for the plaintiff to prevail.[115] Once again, however, the jurisdiction in which the plaintiff finds himself or herself will dictate whether the court will interpret state whistleblower statutes liberally or conservatively.

All fifty states and the District of Columbia have enacted some form of whistleblower protection statute.[116] A commonality between these state statutes is that all contain some sort of protection provision for employees against employer retaliation.[117] There are several areas in which the state statutes provide differing or no amount of protection to whistleblowers.[118] For instance, these "include the type of whistleblower protected, the appropriate recipient of the report of wrongdoing, the subject of protected whistleblowing, the motive of the whistleblower, the quality of evidence of wrongdoing required, and the remedies provided to the employee suffering retaliation."[119] Interestingly, the anti-retaliation version of whistleblower protection has not been nearly as successful as the statutes containing some sort of incentive.[120]

Despite this evidence, most states have chosen not to incorporate the incentives model into their state whistleblower

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111. Callahan & Dworkin, *supra* note 79, at 106.

112. *Id.*

113. *Id.* ("Punitive damages are often awarded in these cases since the employers' actions are seen as being especially wrongful.").

114. *Id.*

115. *Id.* ("[T]he courts are relatively conservative in what they recognize as protected whistleblowing, and if the whistleblower cannot point to a well-established law, rule or regulation that is being violated, she or he is unlikely to be protected.").

116. *Id.* at 107.

117. Callahan & Dworkin, *supra* note 79, at 107.

118. *Id.*

119. *Id.* at 107-08.

120. *Id.* at 108-10 ("A review of the state laws focused specifically on whistleblowing suggests that most state legislatures continue to embrace whistleblower anti-retaliation measures as a mechanism for deterring and uncovering wrongful conduct . . . . The much more effective financial incentives model has not been widely adopted at the state level.").

protection statutes.[121] In the year 2000, Illinois and Florida had adopted an incentives model based on the federal False Claims Act to encourage whistleblowing at the state level.[122] While Oregon, South Carolina, and Wisconsin allow for monetary incentives to be awarded to whistleblowers, the incentives are not significant and this reward program is thought to have little effect on whether a person would decide to report a violation of an employer in good faith.[123]

Perhaps this legislative preference reflects the societal view that those who report violations are nothing more than "tattle tales."[124] Almost all of the states offer general whistleblower protection to public employees while less than half allow all workers to attain the same level of protection as a whistleblower.[125] This stance reveals that fraudulent acts in the public sector are considered a higher priority rather than those in the private sector.[126] The state whistleblower statutes appear to target harm done to the individual employee rather than the societal good argument that is used to justify the use of whistleblower statutes in general.[127] Litigation in the state arena relating to whistleblower statutes includes "whether the substantive standards of the statute were met, whether the plaintiff must prove an actual violation of a law . . . or merely have a reasonable belief that wrongdoing occurred, whether plaintiff's claim has been preempted, whether a statutory claim can exist with a common law claim, and the availability of damages."[128]

For instance, there appears to be no consistent pattern regarding whether the standard set out in the statute for whistleblowers has been met.[129] Recent studies have found that a state's openness to the idea of a wrongful discharge claim is inversely related to the number of claims brought under the

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121. *Id.* at 110.

122. *Id.*

123. *Id.* ("[O]ther states . . . make whistleblowing rewards possible, but the dollar amounts at stake are so insignificant that they are unlikely to influence whistleblowing activity. This seemingly anomalous legislative preference is possibly—perhaps even likely—the result of legislative ignorance on research comparing the efficacy of these approaches.").

124. *See id.*

125. *Id.* at 111.

126. *See id.*

127. *Id.* at 113 ("Although whistleblower protection is most often justified with reference to societal interests, state laws are more likely to cover retaliation for employee harms than for disclosures of conduct threatening to other groups or the public.").

128. *Id.* at 115.

129. *Id.*

statute.[130] States such as New York do not acknowledge a wrongful discharge claim and instead have created niches of protection through health and safety statutes.[131] Courts were more willing to side with whistleblowers when personal safety was a clearly defined aspect of the individual's case.[132]

However, when the facts present an air of uncertainty, the courts tend to side with the employer in whistleblower cases trying to make claims under state statutes.[133] With regard to the issue of whether there had to be an actual violation for the whistleblower to receive protection, some states use a standard of whether it was a reasonable belief made in good faith on behalf of the whistleblower.[134] Other states believe that a whistleblower should not receive any protection from an employer if the alleged violations have no real basis or are inadequately investigated.[135] The minority approach states that a reasonably held belief is not adequate for whistleblower protection in the private sector.[136]

Preemption creates another potential issue between state and federal statutes for whistleblowers.[137] "[T]he Supreme Court recognizes three circumstances in which state law is preempted."[138] These generally include when the federal statute specifically dictates what the state stance should be on an issue, congressional intent can be inferred that could override a state's statutory scheme, or areas in which federal laws have held primary importance.[139] Direct conflict between the two means that a federal statute will prevail.[140]

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130. *Id.*

131. *Id.* at 115-17.

132. *Id.* at 118 ("Not all courts were willing to read the statute liberally to promote safety and health concerns. In a case involving whistleblowing about neglect of a mental health patient, the court found no threat to the health or safety of the public at large and therefore that the statute was inapplicable.").

133. *Id.* ("For example, In [sic] *Green v. Saratoga A.R.C.*, Green reported suspected drug use to public authorities. The court held that she was unable to show that the alleged activity threatened public health or safety.").

134. *Id.* at 120 ("Most of the reported decisions conclude that an actual violation of law or regulation is not a prerequisite to recovery.").

135. *Id.* at 121 ("Courts in these states have given this language the effect of a good faith requirement.").

136. *Id.*

137. *Id.* at 123 ("State laws that conflict with federal legislative schemes are preempted under the Supremacy Clause. Given the sheer number of state and federal whistleblower protection provisions, it is not surprising that the preemptive effect of the latter upon the former has been examined in a number of decisions.").

138. *Id.*

139. *Id.* at 123-24.

140. *Id.* at 124.

However, employment and labor issues have traditionally been handled at the state level so courts might be more willing to side with the state version of a statute rather than a federal one.[141] For the issue of damages, most courts have found that punitive damages are not allowed for a statutory claim made at the state level.[142] There is an overwhelming amount of options that a whistleblower could pursue with his or her claim resulting in numerous potential outcomes. Clarity and uniformity would help utilize the area of whistleblower law in a more proficient and efficient manner. In fact, one can see "[n]ow that whistleblowing has become a well-accepted mechanism to address organizational wrongdoing, policymakers must take the next step, tailoring their approaches to whistleblowing in order to maximize its benefits and minimize its potentially negative consequences."[143]

C. *Public Policy Exception to Employment-at-will Doctrine*

A master servant relationship existed between employees and employers during the 1800s which evolved into what is now known as the employment-at-will doctrine.[144] In its strictest form, this doctrine meant that absent a contract for employment, an employer could essentially fire an employee for any or no reason at all.[145] An employee could likewise leave for any or no reason from a position of employment.[146] Society and subsequently the court system created an exception to the employment-at-will doctrine based on the idea that public policy required certain protections for employees from those employers who might abuse their position of power.[147] The creation of this doctrine is credited to the literary work "Master and Servant" by Horace G. Wood in 1877.[148] This became known as "Wood's Rule"

141. *Id.* ("Because employment regulation is generally viewed as within the states' traditional police powers, the courts are somewhat disinclined to view such laws as preempted.").

142. *Id.* at 129-30.

143. *Id.* at 130.

144. STEPHEN M. KOHN, CONCEPTS AND PROCEDURES OF WHISTLEBLOWER LAW 21 (Quorum Books) (2001).

145. *Id.*

146. *Id.*

147. *Id.* ("Under the public policy exception, whistleblowers in most states have a tort action for wrongful discharge if they can demonstrate that they were fired for 'blowing the whistle' in violation of a clear mandate of public policy.").

148. *Id.*

and has been eroded for some time with the introduction of concepts such as the public policy exception.[149]

Many legal scholars in the first few decades of the next century felt that this erosion was necessary as "[t]he system of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived and too harmonious to correspond with reality."[150] The reality of any employment industry called for flexibility and expansion away from the rigidity of the employment-at-will doctrine.[151] The growing importance of whistleblowing became synonymous with upholding democratic functions of a free society.[152]

Most states now acknowledge the tort of wrongful discharge when an employer violates the public policy exception to the employment-at-will doctrine.[153] Despite differences in court interpretation among the states, there are several activities that seem to be universally treated as public policy exceptions.[154] These include "employees who refuse to violate a statute, constitutional requirement, or regulation; employees who perform an obligation required under the law; employees who exercise a legally protected right; and employees who report a violation of law for the public benefit."[155] The former four groups make up what is generally known as the majority rule approach to interpreting what activities constitute a violation of the at-will doctrine.[156]

The leading case in this area of whistleblower law is *Petermann v. International Brotherhood of Teamsters* from

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149. *Id.* ("'Wood's Rule' . . . was, in the 1880s and 1890s, uncritically adopted by every state . . . . In the twentieth century, the at-will doctrine came under 'intense attack from legal scholars,' and it became the 'almost unanimous view' from commentators that the rule should be modified, especially in light of 'important public policy.'").

150. Kohn, *supra* note 144, at 21.

151. *Id.* at 22.

152. *Id.* ("After cataloguing the important societal contributions made by whistleblowers, Texas Supreme Court Justice Lloyd Doggett concluded that the protection of whistleblowers was vital in a 'democratic, free enterprise system' and that whistleblowers had made a 'lasting contribution to improving our public and private institutions.'").

153. *Id.* at 23 ("Although the public policy exception to the *at-will* doctrine now has 'broad acceptance,' the definition of what conduct should be protected is strongly debated as courts attempt to 'draw the line between claims that genuinely involve matters of public policy and those that concern merely ordinary disputes between employer and employee.'").

154. *Id.*

155. *Id.*

156. *Id.*

1959.[157] In this case, a union member would not give false testimony at a legislative hearing as instructed by his employer.[158] As a result of this fact, this union member was released from his position.[159] The court found that there was a significant public interest in preventing employees from being pressured into committing perjury at the expense of their job.[160] In general, courts have agreed to provide employee protection from being fired "based on an employee's (1) refusal to commit an unlawful act, (2) performance of an important public obligation, or (3) exercise of a statutory right or privilege."[161] There are two additional common law theories which have been used by courts to modify the at-will doctrine:[162] implied contract theories and a duty of good faith and fair dealing.[163]

There is considerable skepticism among legal scholars regarding the efficacy of the public policy exception in actual practice.[164] For example, some feel as if the public policy exception provides protection in name only, given the wide discrepancies in court interpretation and application of the rule.[165] One article points out that the exception only benefits upper level employees who already have access or knowledge of what protections they are owed.[166] Those who are in lower positions are truly disadvantaged and the least likely to pursue their rightful remedy when a wrongful discharge has occurred.[167] In addition to this proposed bias, courts use a balancing test to determine whether a public policy has been violated.[168] This means no specific criteria but rather this "rhetoric of balancing

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157. The Harvard Law Review Assoc., PROTECTING EMPLOYEES AT WILL AGAINST WRONGFUL DISCHARGE: THE PUBLIC POLICY EXCEPTION, 96 HARV. L. REV. 1931, 1932 (1983).

158. Petermann v. Int'l Bd. of Teamsters, 344 P.2d 25, 26 (Cal. Dist. Ct. App. 1959).

159. *Id.*

160. *Id.* at 27.

161. Harvard, *supra* note 157, at 1932.

162. *Id.* at 1935.

163. *Id.*

164. *Id.* at 1932 ("The public policy exception appears to provide employees with a broad source of protection from unjust dismissal. In practice, however, the public policy exception had limited only slightly the harshness of the at will rule. Moreover, it appears that the public policy exception has primarily benefitted employees in upper level jobs.").

165. *Id.*

166. *Id.* at 1938.

167. *Id.* ("[T]he underrepresentation of lower level employees among the ranks of litigants seems a perverse result, because lower level employees are most in need of protection. If the exception is justified as a protection only of the public's interests, such underrepresentation seems to undercut the effectiveness of that protection, because the firing of a lower level employee in derogation of public policy can harm the public as much as can the firing of an upper level employee.").

168. *Id.* at 1949.

tends to conceal the court's ability to control the outcome of any such balance by its choice of the interests to be weighed."[169] It is not surprising that courts reach differing conclusions even with remarkably similar fact patterns. Reporting requirements can present an additional obstacle for those employees who blow the whistle and try to seek protection under the public policy exception.[170] Most states provide some sort of protection for those employees who report to a government authority or their supervisor.[171] Support for internal whistleblowing states that "giving the employer the first opportunity to correct a violation allows it to avoid harm to its reputation, the burden of undergoing an investigation, preparation for a hearing, etc.[172] Informal resolution of infractions also save the [government] both time and resources."[173] Preemption can also raise an issue in this common law context against co-existing state statutes.[174] However, courts have generally stated that common law protections add to the legal arsenal available to whistleblowers and do not conflict with state statutes unless the state legislature has specifically proclaimed that a common law remedy is not available.[175] Public policy presents a viable option for whistleblowers though the difference in application varies by jurisdiction. Perhaps because courts

> "[lack] a principled basis for deciding which firings implicate the interests of the public, courts might do better to acknowledge that *all* employees (and thus the public) have a legitimate interest in ensuring that the exercise of employers' power to discharge their employees is limited to situations in which the employer has 'just cause' for dismissal."[176]

This whistleblower venue would also benefit from a uniform standard of protection.

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169. *Id.* at 1949-50.

170. *See* Kohn, *supra* note 144, at 25.

171. *Id.*

172. *Id.* at 23-24.

173. *Id.* at 24 ("Almost every state that protects whistleblower disclosures protects employees who raise the allegations based on a 'good faith' belief that a law has been violated or that the public safety is threatened.").

174. *Id.* at 24-25.

175. *Id.* at 25 ("The issue of preclusion has become more significant as a number of state legislatures have passed *bona fide* whistleblower protection laws and employees must determine whether the statutory requirements are exclusive or cumulative.").

176. Harvard, *supra* note 157, at 1950.

1. Sarbanes-Oxley

In the wake of Enron, corporate fraud became a congressional target as the legislature tried to reassure the public's faith in the private sector.[177] These concerns led to the passage of the Sarbanes-Oxley Act of 2002.[178] One section in particular deals with those who report securities violations and the appropriate requirements. Section 806 outlines the procedures and rules for whistleblowers who report fraud in publicly held companies.[179] Whistleblower protection has been required with the passage of certain federal laws such as health and safety or environmental acts.[180] Section 806 states that companies who report public earnings must have a procedure set in place for whistleblowers to anonymously report incidents of fraud.[181] This section applies to accounting, internal control, and auditing issues.[182] The Sarbanes-Oxley Act expanded the reach of whistleblower protection for both employees and the fields covered by whistleblower law.[183]

Section 301 of Sarbanes-Oxley states the specifics for a company to be in compliance with the whistleblower requirements.[184] A company has to provide a means for an employee to anonymously report a suspected violation without fear of recrimination.[185] The usual method chosen by companies, who fall under Sarbanes-Oxley, is a hotline which provides the necessary anonymity.[186] The whistleblower requirements usually go hand in hand with the ethics program necessitated by the act as well.[187] Companies have a chance to go above and beyond the bare minimum required and try to provide an environment where honesty in business practice is both preferred and rewarded. However, Sarbanes-Oxley has garnered

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177. Cherry, *supra* note 10, at 1031.

178. *Id.*

179. Robert R. Moeller, SARBANES-OXLEY AND THE NEW INTERNAL AUDITING RULES 71 (John Wiley & Sons, Inc. 2004); *see also* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat 745 (2002).

180. Moeller, *supra* note 179, at 71.

181. *Id.*

182. *Id.*

183. *Id.*

184. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat 745 (2002).

185. Moeller, *supra* note 179, at 89 ("Section 301 of [Sarbanes-Oxley] mandates that the audit committee establish procedures to 'handle whistleblower information regarding questionable accounting or auditing matters.'").

186. *Id.*

187. *Id.*

skepticism concerning whether or not it accomplishes in actuality what it set out to accomplish.[188]

One of the major issues with SOX involves which employees receive protection under the law.[189] There are criminal provisions under the act which apply to all employees in all workplaces.[190] However, there is "a private right of action under Section 806 only if their employer is a publicly traded company."[191] Many scholars feel that SOX is merely a complication of securities and employment law without reforming the problems that led to all the scandal and fallout of corporate fraud in the first place.[192]

Scholars who are skeptical about the efficacy of Sarbanes-Oxley in the workplace have created studies which highlight the hurdles and obstacles to the whistleblower left in place after the passage of SOX. An analysis done by Richard Moberly has found direct evidence to counteract the statements of praise some have given to SOX.[193] This study looked at claims filed by whistleblowers at the administrative level as well as the appellate level and measured the success of both from the perspective of the whistleblower.[194] Moberly found that "during its first three years, only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process."[195] This study focused on two main problems for whistleblowers with Sarbanes-Oxley as administered by the two main agencies who handle whistleblower claims under SOX.

The Occupational Safety and Health Administration (OSHA) is the agency where whistleblowers initially file their claims, which are followed up by an investigation by OSHA.[196]

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188. Cherry, *supra* note 10, at 1033 ("[A] further and fuller analysis reveals that the lack of remedies provided in the Act results in a less effective scheme for encouraging whistleblowing than it would initially seem.").

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* ("Therefore, it would appear that Sarbanes-Oxley incrementally changes both securities law and employment law, rather than radically overhauling either field. Accordingly, one might ask whether section 806 is substantive or merely 'whistling in the dark.'").

193. Richard A. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007).

194. *Id.*

195. *Id.*

196. *Id.*

Administrative law judges from the Department of Labor handle these cases at the appellate level.[197] For the first problem, Moberly's study found that these agencies tended to apply strict interpretations of the sections applying to whistleblowers.[198] Secondly, Moberly found evidence that those cases that went to the appellate level had the wrong burden of proof applied to them by OSHA.[199] This misapplication was largely not in favor of the whistleblower employees.[200]

These main two effects seem to misconstrue the congressional intent behind Sarbanes-Oxley as passed in 2002 and professional hopes that this Act is "the promised land . . . [T]he law represents a revolution in corporate freedom of speech [that] far surpasses, indeed laps, the rights available for government workers."[201] There was good reason for this kind of sentiment when the Act was passed as there were provisions that could provide protection for those who blow the whistle against corporate wrongdoing.[202] For example, these retaliation provisions included noneconomic damages and reinstatement.[203] Despite these added areas of protection for corporate whistleblowers, and "although Sarbanes-Oxley applies to a 'contractor, subcontractor, or agent' of any publicly-traded company, ALJs consistently determined that the Act did not protect employees of privately-held subsidiaries and contractors of publicly-traded companies."[204]

The retaliation provisions are novel because they apply nationally to employees who work for what constitutes a publicly-traded company.[205] In order to qualify, the subject of the whistleblower's complaint must fall into one of six different areas of law and can be reported to a number of sources, including someone who acts as a supervisory authority.[206] This latter

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197. *Id.*

198. *Id.*

199. *Id.* at 67-68.

200. *Id.* ("These findings challenge the hope of scholars and whistleblowers advocates that Sarbanes-Oxley's burden of proof would often result in favorable outcomes for whistleblowers.").

201. *Id.* at 68.

202. *Id.* ("Indeed, a few early victories for employees sparked outrage from management attorneys, who argued that Sarbanes-Oxley's protections were too broad and overly burdensome for employers – a sign that perhaps the Act provided real protections for whistleblowers.").

203. *Id.*

204. *Id.* at 71 (quoting 18 U.S.C. § 1514A(a)(2006)).

205. *Id.* at 77 ("The Act's coverage extends beyond a particular industry and reaches all companies that issue publicly-traded shares . . . . Sarbanes-Oxley [also] protects employees who engage in protected activity related to fraud.").

206. *Id.*

portion provides a whistleblower with more options than a general whistleblower provision.[207] To file a claim for retaliation with OSHA, the whistleblower must meet the prima facie elements: "(1) the employee engaged in protected activity; (2) the employer knew about the activity; (3) the employee suffered an unfavorable personnel action; and (4) the 'circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.'"[208]

The burden of proof requires less evidence than the usual causal links of Title VII retaliation claims.[209] "[A]fter establishing causation and the other prerequisites of the prima facie case, the employee should win unless the employer demonstrates that it would have made the same decision absent any protected activity."[210] The employer must meet a clear and convincing burden of proof.[211] Whistleblowers are required to meet timelines when filing or appealing their claim.[212] They may also have the option of filing in federal court.[213] The article further details the specific requirements a whistleblower must meet to qualify for protection under Sarbanes-Oxley.[214]

Moberly makes several suggestions to improve Sarbanes-Oxley and better capture the original purpose of the Act.[215] He writes:

> "First, Congress should increase the Act's statute of limitations from 90 to at least 180 days. Second, Congress should address [the agencies'] emphasis on 'boundary' issues by clarifying the breadth of application that Congress intended for the Act. Third, Congress should attend to OSHA's inappropriate application of Sarbanes-Oxley's employee-friendly burden of proof, either by giving OSHA more resources to investigate Sarbanes-Oxley complaints thoroughly or by eliminating OSHA's role as principal investigator of these claims. Finally, this [article] recommends further

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207. *Id.* at 80.

208. *Id.* at 79 (quoting 29 C.F.R. § 1980.104(b)(1) (2006)).

209. *Id.* at 80 ("The 'contributing factor' causation test demands less evidence than the 'causal' language required for Title VII retaliation cases and perhaps even less than the 'motivating factor' language utilized in Title VII 'mixed-motive' cases.").

210. *Id.* at 81.

211. *Id.*

212. *Id.* at 82.

213. *Id.*

214. *Id.* at 78-83.

215. *Id.* at 131.

> research regarding whether the faults in Sarbanes-Oxley highlighted by this study suggest that Congress should implement even broader whistleblower protections."[216]

These suggestions are concrete examples of changes that could be used to improve Sarbanes-Oxley. In addition, these ideas and concepts could be used to improve general whistleblower effectiveness and clarity for employees.

IV. TEXAS AS AN EXAMPLE OF THE PROBLEMS A WHISTLEBLOWER CAN FACE AT THE STATE LEVEL

In addition to the federal options available for whistleblowers, Texas provides an example of additional considerations for a whistleblower. The Texas whistleblower statute provides that "[a] state or local government entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority."[217] In particular, this statute says that statutory protection only applies to public employees.[218] However, the statutory requirements do not end there.[219] The employee who manages to discern the statute's applicability must also meet certain reporting standards.[220] In this instance, the public employee must report to an authority whom he or she believes in good faith "regulate[s] under or enforce[s] the law alleged to be violated . . . or investigate[s] or prosecute[s] a violation of criminal law."[221]

In an effort to help an employee understand how to utilize this statute properly, the Attorney General of Texas created an instruction pamphlet that can be accessed online.[222] The pamphlet outlines the general elements of a claim under the Whistleblower Act. Then, an employee must reference the definitional guidelines provided to see if his or her particular situation meets the stated conditions. For example, who

216. *Id.*
217. TEX. GOV'T CODE ANN. § 554.002(a) (West 2006).
218. *Id.*
219. *Id.*
220. TEX. GOV'T CODE ANN. § 554.002(b)(1)-(2) (West 2004).
221. *Id.*
222. Office of the Attorney General of Texas, *Whistleblower Act* (2003), https://www.oag.state.tx.us/AG_Publications/pdfs/whistleblower.pdf.

constitutes a public employee?[223] A particular area of confusion for employees is "what is an 'appropriate' law enforcement authority?"[224] This section includes a definition that is confusing outright.[225] The guidelines say that a proper reporting authority "depends upon the particular circumstances of each case . . . [but] should be reported to an authority the employee believes is authorized to regulate or enforce the law alleged to be violated."[226] This standard allows courts a great deal of latitude in their interpretation.

In *City of Fort Worth v. DeOreo*, a police officer reported to internal police department authority figures an aggravated kidnapping (by her ex-husband and fellow police officer) and the sexual harassment that followed her initial report.[227] Afterwards, she claimed constructive discharge from her job as a police officer.[228] She met the standard of a public employee referred to in the Texas Whistleblower Act, but if her initial report had not been an aggravated kidnapping, her claim would have failed because the police department is not the "proper agency" for harassment claims.[229] Under Texas law, in spite of an internal police reporting policy, the Texas Commission on Human Rights is the proper authority for reporting harassment and retaliation.[230]

Reporting hurdles aside, Texas does provide another method for a whistleblower to recover from a wrongful discharge whether or not the petitioner is a public employee. This legal protection arises under the public policy exception to the employment-at-will doctrine. However, this definition has been narrowly defined by Texas courts.[231] The Texas Supreme Court set the public policy exception standard in 1985.[232] The Court essentially stated it would recognize a public policy exception only when the plaintiff proved "by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act."[233] In a subsequent case, the court reiterated this

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223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. Sinzdak, *supra* note 73, at 1646; City of Fort Worth v. DeOreo, 114 S.W.3d 664, 667-70 (Tex. App. 2003).
228. DeOreo, 114 S.W.3d at 668; Sinzdak, *supra* note 73, at 1646.
229. DeOreo, 114 S.W.3d at 668-70.
230. Sinzdak, *supra* note 73, at 1646-47.
231. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).
232. *Id.*
233. *Id.*

exception and reasoned that crafting a broad common law whistleblower exception would "effectively emasculate a number of statutory schemes" by the legislature.[234] The Court held this exception would apply if the employer's only reason for firing the employee was because of the employee's refusal to commit an illegal act.[235]

V. A PERSONAL LOOK INTO THE LIFE OF A WHISTLEBLOWER

The generic vision of a whistleblower brings to mind someone who has perhaps faced obstacles in his journey but who ultimately would not regret any of the choices he made. His choice was made in the spirit of doing what was right - and who could regret trying to uphold justice? The past decade provides several examples of people who could easily fall into this category of a whistleblower. For instance, Cynthia Cooper blew the whistle on the corporate fraud occurring at WorldCom.[236] Cooper had been a loyal employee who started with WorldCom from its humble beginnings and saw its ultimate demise.[237] Her journey included both highs and lows.[238] She tried to internally bring the company's attention to the fraud, but nothing seemed to be corrected.[239] The media ultimately got involved and Cooper became an overnight whistleblower.[240] While there are bittersweet moments, she seems to stand steadfastly to her decision despite the personal burden being a whistleblower placed on her shoulders.[241]

The healthcare industry has been a major area for fraudulent practices being committed against the government in recent times.[242] Peter Rost felt the personal price of being a whistleblower as evidenced in his novel.[243] The company he worked for was involved in a takeover from Pfizer.[244] At his previous employer, he had acted as a whistleblower concerning

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234. Austin v. HealthTrust, Inc., 967 S.W.2d 400, 403 (Tex. 1998).

235. *Id.*

236. Cynthia Cooper, EXTRAORDINARY CIRCUMSTANCES: THE JOURNEY OF A CORPORATE WHISTLEBLOWER x (John Wiley & Sons, Inc. 2008).

237. *Id.* at vii, x.

238. *Id.* at vii-x.

239. *Id.* at ix.

240. *Id.* at x.

241. *See* Cherry, *supra* note 10, at 1041.

242. *See* Centers, *supra* note 26, at 2.

243. Peter Rost, THE WHISTLEBLOWER: CONFESSIONS OF A HEALTHCARE HITMAN (Soft Skull Press 2006).

244. *Id.* at 7.

certain practices.[245] This information came out, and it was not seen as a positive thing.[246] Instead, his new employer saw this action as evidence of a "tattle tale."[247] As his work life became more complicated, he tried to pursue other work opportunities.[248] However, his most recent supervisor would not provide him a recommendation despite high praise in the past.[249] No one wanted to be associated with a whistleblower as this placed a black mark of sorts on anyone who associated or sided with a whistleblower.[250] Rost was virtually guaranteed that he would no longer find work in the industry.[251] With a family to support and no other job prospects on the horizon, he felt persecuted for the decision he had made regarding the business practices of his former employer.[252] In the end, Rost's story seems to have somewhat of a happy ending as he has found other work opportunities based on his decision to be a whistleblower.[253] There seems to be a sense of vindication with his story as the media and outsiders can at least appreciate the integrity of his choices. His journey as a whistleblower captures the spirit of the dedication Rost chose to use in his book. Rost quotes a study of 233 whistleblowers by Donald Soeken, in which:

> After blowing the whistle on fraud, 90 percent of the whistleblowers were fired or demoted, 27 percent faced lawsuits, 26 percent had to seek psychiatric or physical care, 25 percent suffered alcohol abuse, 17 percent lost their homes, 15 percent got divorced, 10 percent attempted suicide, and 8 percent were bankrupted. But in spite of this, only 16 percent said what they wouldn't blow the whistle again.[254]

Despite these stories of ultimate justice and vindication, there are a number of personal accounts which create a different image of a whistleblower.

One author comments that the majority of whistleblowers he encountered at whistleblower support groups would present an

245. *Id.* at 37.
246. *Id.* at 44.
247. *Id.*
248. *Id.* at 50.
249. *Id.* at 49-50, 101.
250. *Id.* at 100.
251. *Id.*
252. *See id.* at 99.
253. *Id.* at 193.
254. Rost, *supra* note 243, at dedication page.

entirely different story.[255] From his view, the average whistleblower does not get properly compensated for the personal sacrifices made.[256] The whistleblower appears to be more of a victim of the system. The average whistleblower does not know the appropriate legal remedies or, if a claim is pursued, loses out for reasons such as a lack of standing to sue his employer.[257] This process is not a quick one, and a whistleblower could stand to lose a great amount while waiting for the legal system to compensate him. Many whistleblowers not only lose their jobs but their families or houses;[258] these losses are in addition to the reputational problems within their work and personal community.[259] The media can hurt or help a whistleblower. However, the majority of whistleblower cases are not of enough significance to warrant the media's support.

Cases such as Peter James Atherton present a different side to the idealistic whistleblower.[260] Atherton was a nuclear engineer and inspector for the Nuclear Regulatory Commission.[261] He warned a company in Maine of a hazard created by wires being placed too closely together in the event of an emergency in the nuclear power plant.[262] Essentially, the cables needed to shut down the plant during an emergency were not separated correctly and these all would fail in the event of a fire.[263] This could lead to a nuclear meltdown.[264] Atherton's suggestion to shut down the plant until all was fixed was ignored.[265] After attempting to take his claims directly to

255. C. Fred Alford, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 1 (Cornell University Press 2001).

256. *Id.* at 1-2.

257. *Id.*

258. *See* Peter Rost, THE WHISTLEBLOWER: CONFESSIONS OF A HEALTHCARE HITMAN (Soft Skull Press 2006); *see also* Rost, *supra* note 243.

259. *See generally* Rost, *supra* note 258.

260. Alford, *supra* note 255, at 22.

261. *Id.*

262. *Id.*

263. *Id.*

264. C. Fred Alford, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 22-23 (Cornell University Press 2001) ("Atherton's concerns were not based on fantasy. Just three years earlier, in 1975, some workers used a candle flame to check for air leaks in the containment building that housed the reactor . . . . The flame touched some insulation, igniting a fire that burned more than two thousand cables and disabled electrical controls at the plant. It took more than three days to shut down the plant's two operating reactors, one of which came close to boiling off its cooling water. Had that happened, a meltdown would have occurred.").

265. *Id.* at 23.

President Carter, Atherton was submitted to involuntary psychiatric confinement and subsequently fired.[266]

Twenty years later, he lives a "Spartan" lifestyle in a rundown apartment building where he does odd jobs in exchange for rent.[267] In 1991, Atherton's predictions came true when there was an explosion at the plant.[268] The media uncovered the old NRC reports stating that the NRC had knowledge of these problems.[269] Only now has Atherton received any sort of positive acknowledgement for his decision to be a whistleblower.[270] It feels like very little much too late. While his story may seem extreme, it begs the question of whether the protections available to whistleblower on a federal or state level really adequately compensate for the potential fallout of a whistleblower's decision.

VI. CONCLUSION

What does it mean to be a whistleblower? The idealized version entails someone who is willing to do what is right regardless of the personal cost for such actions.[271] The reality of the situation can paint an entirely different picture at times. If society wants to encourage citizens to go against the grain and blow the whistle on employers, then perhaps it is time that protections available to whistleblowers were expanded. One suggestion has been to provide general whistleblower protection to all employees.[272] This could help ease the confusion of which employees are federally protected or if the employee falls under a state statute or whether some sort of common law provision is available. The qui tam provisions coupled with anti-retaliation provisions make an effective combination.[273] Financial incentive paired with protection from employers creates monetary means for a whistleblower to pick up the pieces of her career and make ends meet.

However, financial incentives are not always possible with the variance in employer size and the type of infraction committed.[274] This also leaves questions of how to handle

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266. *Id.*

267. *Id.*

268. *Id.* at 24.

269. C. Fred Alford, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 24 (Cornell University Press 2001).

270. *Id.* at 24-25.

271. *Id.* at 1.

272. Kohn, *supra* note 144, at 377-78.

273. *See History of the False Claims Act, supra* note 27.

274. *See* Moberly, *supra* note 193, at 150.

reporting requirements which vary from jurisdiction to jurisdiction.[275] A national model that outlines general whistleblower protection provides a good starting point to draft reporting requirements.[276] Most importantly, this act would apply to all employees.[277] It would not matter if they worked for the federal or state government or even in the private sector.[278] SOX did a lot to expand whistleblower protection from the traditional federal or state employees to those in the private sector.[279] However, SOX still draws additional lines between employees for qualification purposes. This seems to only compound the problem of getting protection for any whistleblower.

Employees should be made aware of their options if they were to become a whistleblower. It should not be so complex and impractical that reporting to the wrong supervisor means the employee cannot have her day in court. A general federal act could outline the minimum expected for whistleblower protection regardless of individual circumstance. This way, employees would at least know a starting place when considering whether to go forward with their potential case. Some might argue that this will place an inordinate and burdensome financial weight on the shoulders of many industries and companies.[280] Perhaps the money that is awarded back to the Treasury could help those whistleblowers who do not have the option of a qui tam lawsuit. The business community and society, in general, have financially benefitted from the decisions of individuals to be whistleblowers.[281] Why shouldn't society make sure that whistleblowers are taken care of? Actual fraud or a good faith allegation should make a difference in how cases are treated just as they are now. Retaliation should still not be tolerated in either case.

A company's choices regarding whistleblower protection can set a positive or negative tone for employees. Employers can provide clear access to whistleblower hotlines or simply do the bare minimum if anything is even required of that company by law. The current economic climate has, apparently, done nothing

275. *See* Kohn, *supra* note 144, at 21.
276. *See id.* at 379.
277. *Id.*
278. *Id.*
279. Moeller, *supra* note 179, at 71.
280. *See* Moberly, *supra* note 193, at 150.
281. *See generally* Centers, *supra* note 26.

to help dissuade patterns of corporate fraud.[282] Instead, there are statistics stating that there is an expected increase in the amount of corporate fraud, especially regarding financial reporting, that has occurred and will continue to occur.[283] In fact, the SEC "has reported a significant increase in 2010 in both the number and size of fraud cases."[284] Deloitte LLP, for the last three years, has conducted their "Ethics and Workplace Survey."[285] This survey examines employee concerns and thoughts regarding "trust in the workplace."[286] Interestingly, employees pointed out that a "lack of trust and transparency are reasons employees will look for new jobs."[287] Employee turnover creates additional cost for companies that could be avoided by addressing such concerns. Expanded whistleblower protection can help foster this environment for employees.

A standardized approach to whistleblower protection would provide clarity at both the state and federal levels. SOX provided an example of how to present companies with workable models such as an anonymous hotline.[288] Each company has differing resources and these practical aspects should be considered when promulgating such rules. It should not be acceptable that those who choose to be whistleblowers would regret such decisions based on their subsequent treatment by employers and society. Perhaps the way to change society and ultimately employer's views would be for Congress to take a stance and for the benefits of whistleblowing to continue to be highlighted in a positive light.

Hopefully, companies consider an employee who lives up to codes of conduct and ethics to be a valued asset. However, companies do have opposing interests such as bottom lines and shareholders. Companies need to learn to equate the benefits of internal accountability to ethics as working with the former goals and not against them. As seen with the ethics survey above, companies can receive positive returns from adopting proactive whistleblower statutes with high employee retention rates. This

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282. *See* Curtis C. Verschoor, *Increased Motivation for Whistleblowing*, AccountingWeb, (2010), http://www.accountingweb.com/topic/watchdog/increased-motivation-whistle-blowing (explaining that current corporate trends have led to the passage and necessity of additional whistleblower protection).

283. *Id.*

284. *Id.*

285. Deloitte LLP, *Trust in the Workplace: 2010 Ethics and Workplace Survey*, http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2010_Ethics_and_Workplace_Survey_report_071910.pdf.

286. *Id.* at 23.

287. *Id.* at 4.

288. Moeller, *supra* note 179, at 71.

is a way to conserve corporate resources. Companies have to make this allocation of resources decision for themselves as to which is a higher priority: a corporate culture that places a premium on ethics in the workplace or a management policy that looks at ways to increase the bottom line independent of such concerns. However, companies seem to be slow taking the initiative in this area. Thus, it appears that this is an area best served by legislative clarification. Congress stands in the best place to make the path for whistleblowers less rocky and strengthen the national stance against corporate fraud.

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